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In the Supreme Court of the United States

OCTOBER TERM, 1975

LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, ET AL., PETITIONERS

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

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INTEREST OF THE NATIONAL LABOR RELATIONS BOARD

The decision of the Supreme Court of Wisconsin in this case involves the extent to which the National Labor Relations Act, 29 U.S.C. 151 *et seq.* ("NLRA"), preempts state labor laws; it thus has a direct im-

pact on the administration of the NLRA. The court below held that state law prohibits union inducement of the employees of an employer subject to the NLRA to engage in a concerted refusal to work voluntary overtime for the purpose of supporting the union's contract demands. For the reasons stated below, permitting the State to proscribe the use of that economic weapon in collective bargaining negotiations upsets the balance which Congress has struck in the NLRA between the legitimate rights of labor and management. The decision below is thus inconsistent with national labor policy. The National Labor Relations Board is responsible for administering the NLRA and implementing the national labor policy promulgated by Congress therein. For these reasons, it has a significant interest in seeking a reversal of the decision below.

STATEMENT

The facts are fully set out in the opinion below and in the petition (Pet. App. A-2—A-4; Pet. 3-7). In brief, they show that during negotiations for a new collective bargaining agreement, Kearney and Trecker Corp. ("Employer") sought to lengthen the basic work week—after which work was compensated at overtime rates—from 37½ hours to 40 hours. The Union (Lodge 76 and District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO, petitioners herein) objected, and a bargaining impasse developed. The Employer then announced its intention of implementing the 40-hour week, and the Union countered by enacting resolu-

tions prohibiting any member from working overtime, *i.e.* in excess of 37½ hours a week.[1] Until agreement on a new contract was reached, almost all the members of the Union refused to accept daily or weekend overtime but otherwise performed their normal duties. (Pet. App. A-2—A-3, A-26—A-27, A-31—A-33.)

The Employer did not implement the announced 40-hour work week.[2] During the contract negotiations, it filed a charge with the Regional Director of the National Labor Relations Board alleging that the Union's overtime ban violated Section 8(b)(3) of the NLRA, 29 U.S.C. 158(b)(3). The Regional Director dismissed the charge on the ground that the Act did not prohibit the Union's conduct. (Pet. App. A-3—A-4, A-17, A-40—A-41; App. 52-54.)

The Employer also filed a complaint with the Wisconsin Employment Relations Commission alleging that the Union's conduct violated Section 111.06(2)(h), Wis. Stat. Ann., which prohibits engaging "in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike." The state agency found that the Union had violated the statute and ordered it to cease and desist from authorizing, encouraging, and condoning any concerted employee refusal

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[1] By custom and understanding, acceptance of overtime work by the employees had always been voluntary (Pet. App. A-32; App. 22, 24, 39).

[2] Nor did the Employer discipline the employees for refusing to work overtime (Pet. 5; App. 39).

to work overtime, and to take certain affirmative action to insure the nonrecurrence of such activity (Pet. App. D). The state courts enforced this order, rejecting the petitioners' contention that the state law was preempted by the NLRA (Pet. Apps. B, C).

ARGUMENT

1. *International Union, UAW* v. *Wisconsin Employment Relations Board*, 336 U.S. 245 (*Briggs-Stratton*), was decided in 1949 when the doctrine of NLRA preemption was in its infancy. It held that the Wisconsin Employment Relations Commission (WERC) was empowered to bar a union from instigating certain intermittent and unannounced work stoppages.[3] The Court, finding that such activity was neither prohibited by Section 8 nor protected by Section 7 of the NLRA, concluded that it was governable by the State. Subsequent decisions, however, have so substantially limited and eroded *Briggs-Stratton* that

[3] *Briggs-Stratton* presented quite a different factual situation from that here. The employees here simply refused to volunteer to work overtime, in order to enforce their demand that the hours of work not be changed; there, the union repeatedly called special meetings during working hours "without warning to the employer or notice as to when or whether the employees would return" (336 U.S. at 249), and the employer was not informed of any of the union's bargaining demands. Moreover, the strike in *Briggs-Stratton* was far from peaceful—"there was also evidence of considerable injury to property and intimidation of other employees by threats and no one questions the State's power to police coercion by those methods" (*id.* at 253).

it can no longer be deemed to have continuing validity.

Thus, in *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 245-246, the Court held that:

> When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.
>
> * * * In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. * * * The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.[4]

[4] Under the *Garmon* test, there has been no "clear determination" by the Board that the conduct here is unprotected by Section 7. It is at least "arguably protected." The Wisconsin Supreme Court interpreted the Board's decision in *Prince Lithograph Co.*, 205 NLRB 110, as holding that "a concerted refusal to work scheduled or requested overtime is not protected, even if that overtime is voluntary" (Pet. App. A-12). In fact, the Board in *Prince* found that the employees there had a right to refuse to work overtime and that in exercising this right on a concerted basis, they "did not engage in unprotected activity." 205 NLRB at 115. It simply further held that the employer had a countervailing right to replace the partial strikers, as any other strikers, in order to get the job done. *Id.* at 110, n. 2, *Prince* is thus entirely consistent with

Referring to *Briggs-Stratton*, the Court added: "The approach taken in that case, in which the Court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application" (*id.* at 245, n. 4).[5]

Dow Chemical Co., 152 NLRB 1150, in which the Board found that the employees' refusal to volunteer for overtime work was protected activity. The Board reasoned that, "since the employer had already agreed to permit employees to decide for themselves whether they wished to work on weekends," it could not be said that they were seeking to impose their own terms of employment by refusing to volunteer for overtime (152 NLRB at 1152). The situation in *Dow* was distinguished from another line of cases, *John S. Swift Co.*, 124 NLRB 394, enforced as modified, 277 F.2d 641 (C.A. 7), and *Honolulu Rapid Transit Co., Ltd.*, 110 NLRB 1806, on the ground that in the latter cases the employees' activities were unprotected because they refused to perform required overtime work, and thus attempted to alter the conditions of their employment (152 NLRB at 1152). The overtime work in the instant case was also voluntary, and the Wisconsin Supreme Court conceded that "[t]here may be a question as to whether *Dow* is in fact distinguishable" (Pet. App. A-11).

[5] In *Amalgamated Association of Street Employees* v. *Lockridge*, 403 U.S. 274, the Court reaffirmed *Garmon*. It explained that "varying approaches were taken by the Court in initially grappling with this pre-emption problem," including having the Court undertake "a thorough scrutiny of the federal Act to ascertain whether the state courts had, in fact, arrived at conclusions inconsistent with its provisions," citing *Briggs-Stratton*. "[N]one of these approaches proved satisfactory, however, and each was ultimately abandoned" in favor of the *Garmon* approach, since each of the old methods "sacrificed important federal interests in a uniform law of labor relations centrally administered by an expert agency without yielding anything in return by way of predictability or ease of judicial application." *Lockridge, supra*, 403 U.S. at 290-291.

In 1960, this Court again considered a case involving a concerted refusal of employees to perform part of their usual work, *National Labor Relations Board* v. *Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477.[6] The issue there was whether the Board properly found that such conduct constituted a refusal to bargain in good faith in violation of Section 8(b)(3) of the NLRA. In holding that the conduct did not violate the Act, the Court adopted not only a more comprehensive approach to the preemptive scope of the NLRA than was evident in *Briggs-Stratton* (361 U.S. at 493, n. 23), but also a new attitude toward so-called partial strikes, the specific conduct involved in both cases. In *Insurance Agents'* the Court reconsidered the relation of partial strikes to fundamental national labor policy. It emphasized (361 U.S. at 489):

> The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. * * * [A]t the present statutory stage of our national labor relations policy, the two factors —necessity for good faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree to one's terms—exist side by side. * * *

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[6] The union sponsored such concerted on-the-job activities as refusing to solicit new business, reporting late, leaving at noon as a group, and refusing to perform customary duties (361 U.S. at 480-481).

The rationale of *Insurance Agents'* is inconsistent with the conclusion of the court below that the States may prohibit the use of such economic pressures, although the Board may not (Pet. App. A-19). Since the Board cannot act as arbiter of the propriety of the use of economic weapons in furtherance of the national labor policy (see 361 U.S. at 490),[7] there is no room for the States to do so in furtherance of individual state labor policies. See Michelman, *State Power to Govern Concerted Employee Activities*, 74 Harv. L. Rev. 641, 669 (1961).

2. This Court has frequently recognized that, in the labor relations field, "[t]he federal regulatory scheme (1) protects some activities, * * * (2) prohibits some practices, and (3) leaves others to be controlled by the free play of economic forces." *National Labor Relations Board* v. *Nash-Finch Co.*, 404 U.S. 138, 144. Thus, in *Garner* v. *Teamsters, etc., Local No. 776*, 346 U.S. 485, and *Teamsters Union* v. *Morton*, 377 U.S. 252, this Court recognized that activity which was neither specifically protected nor specifically prohibited by the NLRA was nonetheless preempted from state regulation because Congress intended to leave it unregulated. See also *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 382, n. 17; Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1347-1348, 1352 (1972).

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[7] See also *American Ship Building Co.* v. *National Labor Relations Board*, 380 U.S. 300, 317-318; *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 741, n. 7; *Florida Power & Light Co.* v. *Electrical Workers*, 417 U.S. 790, 805, n. 16.

Even if, as the court below concluded (Pet. App. A-14), this total preemption of state regulation applies only in certain specific areas where there is clear congressional intent to leave the activities free of governmental restrictions, *Insurance Agents'* teaches that partial strikes used as economic weapons during contract negotiations are within such an area.[8] Thus, partial strikes are one of the "economic pressure devices" (361 U.S. at 489) which the NLRA contemplates will be available. They are therefore beyond the reach of state regulation, regardless of whether they are arguably within Section 7 or 8 of the Act.[9]

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[8] Nor does *Hanna Mining Co.* v. *District 2, Marine Engineers*, 382 U.S. 181 (Pet. App. A-8—A-9), support the state court's assertion of jurisdiction here. In that case, this Court held that the NLRA did not preclude a state court from enjoining picketing by a union to obtain representation rights on behalf of supervisors. The state court was authorized to enjoin the picketing there because such restraint was consistent with national labor policy, and was neither arguably protected nor arguably prohibited by the Act. The objective of the picketing in *Hanna* was to pressure the employer to recognize and bargain with a union of supervisors. This was contrary to the national labor policy of leaving employers free from compulsion to recognize and bargain with a supervisors' union. The state court injunction furthered that policy by relieving the employer of such union pressure.

In contrast, the relief granted by the state court here is in derogation of national labor policy, since it prohibits activity which the federal Act has left free, thereby frustrating the congressional determination to leave this economic weapon available (*Insurance Agents', supra*) and upsetting the balance of power in labor disputes which Congress has struck.

[9] In light of the fundamental tenet of national labor policy affirmed in *Insurance Agents'*—that the non-violent use of

3. Finally, preemption is appropriate here since this case involves no state interest that is "deeply rooted in local feeling and responsibility." *Taggart* v. *Weinacker's, Inc.*, 397 U.S. 223, 228 (Burger, C.J., concurring). See, *e.g.*, *UAW* v. *Russell*, 356 U.S. 634 (violence); *Linn* v. *United Plant Guard Workers, Local 114*, 383 U.S. 53 (malicious libel).[10] The State has not applied a law of general applicability, which only tangentially touches the interests of parties to a labor dispute. Rather, it has applied a labor relations statute that is predicated on an evaluation of the same interests that Congress considered and balanced in formulating national labor policy. See *Cox*, *supra*, 85 Harv. L. Rev. at 1352-1356. The State's contrary evaluation of those interests thus directly conflicts with federal policy and creates the very problem that the doctrine of preemption is designed to avoid.

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economic weapons during contract negotiations should not be subject to government regulation—the conduct at issue here is preempted even if it is not affirmatively protected by Section 7. Accordingly, the problem which troubled Mr. Justice White in *Longshoremen's Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195, 201, and *Lockridge*, *supra*, 403 U.S. at 325-328—whether *Garmon* should be applied in situations in which an employer confronted with "arguably protected" conduct has no fully adequate means of obtaining a determination whether it is in fact protected—is not presented by this case. Protection *vel non* is here simply not the question upon which preemption turns.

[10] Neither does it present a conflict, such as occurs in the foreign flag cases, where the Court has to balance the competing interests of national labor policy and international maritime law. See, *e.g.*, *Windward Shipping (London) Ltd.* v. *American Radio Ass'n*, 415 U.S. 104.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Wisconsin should be reversed.

Respectfully submitted.

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